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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 316

THE HECHT COMPANY, PETITIONER

v.

PRENTISS M. BROWN, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION

MEMORANDUM FOR RESPONDENT

OPINIONS BELOW

The memorandum opinion of the District Court (R. 441–447) is reported in 49 F. Supp. 528. The opinions of the United States Court of Appeals for the District of Columbia (R. 604–615) are not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on July 22, 1943 (R. 616). The petition for a writ of certiorari was filed in this Court on September 2, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13, 1925.

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QUESTION PRESENTED

Whether the Price Administrator, upon showing that a defendant has engaged in acts and practices violative of Section 4 of the Emergency Price Control Act of 1942, is entitled as of right under Section 205 (a) of the Act to an injunction restraining the defendant from engaging in such acts or practices.

STATUTE AND REGULATION INVOLVED

The case involves the Emergency Price Control Act of 1942 (Act of Jan. 30, 1942, 56 Stat. 23, 50 U. S. Code Appendix, Supp. II, Sec. 901), and the General Maximum Price Regulation (7 Fed. Reg. 3153) issued thereunder.

The applicable provisions of the Emergency Price Control Act are the following:

> SECTION 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

SECTION 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

The General Maximum Price Regulation, issued under Section 2 of the Emergency Price Control Act on April 30, 1942 (7 Fed. Reg. 3153), reads in pertinent part as follows:

SECTION 1499.1 *Prohibition against dealing in commodities or services above maximum prices.*—On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:

(a) No *person* shall *sell* or deliver any *commodity,* and no person shall sell or supply any *service,* at a price higher than the maximum price permitted by this General Maximum Price Regulation; * * *

SECTION 1499.2 *Maximum prices for commodities and services: general provisions.*—Except as otherwise provided in this General Maximum Price Regulation, the *seller's* maximum price for any commodity or service shall be:

(a) *In those cases in which the seller dealt in the same or similar commodities or services during March 1942:*

The highest price charged by the seller during such month—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service, most nearly like it; or

(b) *In those cases in which the seller did not deal in the same or similar commodities or services during March 1942:*

The highest price charged during such month by the *most closely competitive seller of the same class*—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

* * * * *

SECTION 1499.11 *Base-period records.*—Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation, shall:

(a) Preserve for examination by the Office of Price Administration all his exist-

ing *records* relating to the prices which he charged for such of those commodities or services as he delivered or supplied during March 1942, and his offering prices for delivery or supply of such commodities or services during such month; and

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March 1942 and his offering prices for delivery or supply of such commodities or services during such month, together with an appropriate description or identification of each such commodity or service; and

(2) All his customary allowances, discounts, and other price differentials.

* * * * *

SECTION 1499.12. *Current records.*—Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this General Maximum Price Regulation; and, in addition, records showing, as precisely as possi-

ble, the basis upon which he determined maximum prices for those commodities or services.

* * * * * *

SECTION 1499.13. * * *

(b) On or before June 1, 1942, every person offering to sell cost-of-living commodities at retail shall file with the *appropriate War Price and Rationing Board* of the Office of Price Administration a statement showing his maximum price for each such commodity, together with an appropriate description or identification of it. Such statement shall be kept up to date by such person by filing on the first day of every succeeding month a statement of his maximum price for any cost-of-living commodity newly offered for sale during the previous month, together with an appropriate description or identification of the commodity.

STATEMENT

The petitioner is a company operating a department store in Washington, D. C., divided into 107 departments, each selling a separate line of merchandise (R. 449). This suit, brought by the Administrator, was the outgrowth of an investigation made by him in September 1942, to ascertain whether the company was complying with the Price Control Act and the General Maximum Price Regulation.

The complaint, seeking injunctive relief under the Act, was filed in December 1942, and

charged the Company with having violated the Act and Regulation (a) in selling commodities at prices in excess of the maximum price permitted by the Regulation; (b) in failing to prepare and keep the statement required by section 1499.11 of the Regulation; (c) in failing to prepare and file with the appropriate War Price and Rationing Board a statement relating to cost-of-living commodities in conformity with section 1499.13 of the Regulation; (d) in failing to keep its statement relating to cost-of-living commodities up to date in conformity with section 1499.13 of the Regulation; and (e) in failing to keep current records in conformity with section 1499.12 of the Regulation (R. 1–3).

The company in its answer denied generally the essential allegations of the complaint and further pleaded that any failure or neglect to comply with the Regulation was wholly involuntary, was corrected as soon as discovered, and was so inconsequential and unsubstantial compared with the substantial compliance by the company that it did not constitute a basis for the issuance of an injunction against the defendant (R. 13).

In investigation made by the Administrator there was of necessity no attempt to examine thoroughly into every department of the store or into every sale made in the departments investigated. It was simply a "spot check" (R. 27, 42, 45, 46) confined to seven departments of the company's store. In each department investigated

the examination disclosed numerous violations of the Act and the Regulation. Because the scope of the investigation was confined to the seven departments mentioned no search was made for violations of the Act and Regulation in other departments except to ascertain whether the company was posting its ceiling prices as required by the Regulation. Consequently, no evidence with reference to those departments was offered at the trial.

The evidence showed without dispute that in a period of only five months in but seven of the 100 or more departments the company, in direct violation of the Regulation, (1) made 3,838 sales at prices in excess of the legal maximum; (2) collected at least $4,623.15 more than it was legally entitled to do; (3) failed to include on the cost-of-living statement which it was required to file with the appropriate War Price and Ration Board more than 460 articles which should have been included thereon; and (4) failed to describe with sufficient clarity more than 446 items scheduled on the cost-of-living statement which it did file.

At the trial the company did not dispute the fact that it had violated the Act and Regulation, but by way of confession and avoidance offered evidence tending to show that it had not wilfully violated the Act, had acted in good faith, and had made a bona fide effort to comply with the Act and Regulation. The evidence so offered is fully

summarized in the findings of fact set forth at length in the company's petition for certiorari.

The district court handed down an opinion stating that while the company had violated the law, the violations were few in comparison with the total volume of business transacted by the company and innocent in character; that the company had acted in good faith and had made a bona fide effort to comply with the law and had substantially complied therewith. It directed that a temporary restraining order be dissolved and the complaint dismissed. Findings of fact and conclusions of law and a formal judgment followed. (R. 441–454.)

On appeal the United States Court of Appeals for the District of Columbia, one member dissenting, reversed the judgment, holding that where violations of the Act and Regulation are shown or admitted the Administrator's right to an injunction under the statute is absolute (R. 604–615).

DISCUSSION

The decision of the Court of Appeals is not in conflict with the decision of any appellate court. It is in harmony with the decisions of a number of district courts,[1] though other district courts

[1] *Brown, Administrator*, v. *Society Brand Hat Company* (E. D. Mo. June 17, 1943); *Henderson* v. *Baldwin*, OPA Service 622:43 (W. D. Pa. 1942); *Henderson* v. *C. Thomas Stores, Inc.*, 48 F. Supp. 295 (D. Minn.); *Brown* v. *John H. Maxwell* (N. D. Tex. Feb. 25, 1943, not yet reported, pending on rehearing on issue of treble damages).

followed the decision of the district court in the present case before it was reversed on appeal (see Pet. 25). The question presented is of substantial importance in the enforcement of the Emergency Price Control Act, and for that reason we do not feel justified in opposing the petition.[2]

We wish to point out, however, that the question is neither so novel nor so difficult as petitioner suggests. The case involves a statutory injunctive remedy provided for the vindication of the public interest, and not resort to the general equity powers of the courts. In such a case, the "usual equitable grounds" for relief need not be shown, for "where an injunction is authorized by statute it is enough if the statutory conditions are satisfied." *Henderson* v. *Burd,* 133 F. (2d) 515, 517 (C. C. A. 2). See *United States* v. *San Francisco,* 310 U. S. 16; *United States* v. *Adler's Creamery,* 110 F. (2d) 482 (C. C. A. 2), certiorari denied, 311 U. S. 657.

The statutory conditions here prescribed—a showing that the defendant has engaged or is about to engage in acts or practices in violation of Section 4 of the Act—follow familiar legislative models. Congress might have taken as a prototype the injunctive provisions of statutes leaving a measure of discretion in the courts, as

[2] At the 1942 Term the Government sought, unsuccessfully, review of a cognate question under the Fair Labor Standards Act, asserting its importance. *Walling* v. *T. Buettner & Co.,* No. 1019, 1942 Term.

in the Sherman Act, or requiring a "proper showing"[3] or proof of present or threatened violations.[4] Instead, Congress adopted as a model those statutes which unambiguously provide for the issuance of an injunction or cease-and-desist order upon proof of past violations,[5] without any of the foregoing qualifications: the Investment Companies Act,[6] the Investment Advisors Act of 1940,[7] the Clayton Act,[8] the Federal Trade Commission Act,[9] and the National Labor Relations Act.[10] The legislative choice is underscored by the legislative history, as the court below pointed

[3] Securities Act of 1933, c. 38, Sec. 20, 48 Stat. 86, 15 U. S. C., sec. 77t; Securities Exchange Act of 1934, c. 404, Sec. 21, 48 Stat. 899, 15 U. S. C., sec. 78u; compare Fair Labor Standards Act, c. 676, Sec. 17, 52 Stat. 1060, 29 U. S. C., sec. 217. See *Securities and Exchange Comm'n* v. *Lawson*, 24 F. Supp. 360 (D. Md.).

[4] Securities Act and Securities Exchange Act, *supra*. See *Securities and Exchange Comm'n* v. *Torr*, 87 F. (2d) 446 (C. C. A. 2); *id.*, 22 F. Supp. 602 (S. D. N. Y.).

[5] The Commodities Exhange Act, after the decision in *Wallace* v. *Cutten*, 298 U. S. 229, was amended to permit revocation of a broker's license for past violations. See *Nichols & Co.* v. *Secretary of Agriculture*, 131 F. (2d) 651 (C. C. A. 1).

[6] Section 42 (Act of Aug. 22, 1940, c. 686, Title I, 54 Stat. 842, 15 U. S. C., sec. 80a–41).

[7] Section 209 (Act of Aug. 22, 1940, c. 686, Title II, 54 Stat. 853, 15 U. S. C., sec. 80b–9).

[8] Section 11 (Act of Oct. 15, 1914, c. 323, 38 Stat. 734, 15 U. S. C., sec. 21).

[9] Section 5 (Act of Sept. 26, 1914, c. 211, 38 Stat. 719, 15 U. S. C., sec. 45).

[10] Section 10 (c) (Act of July 5, 1935, c. 372, 49 Stat. 543, 29 U. S. C., sec. 160 (c)).

out; in a general revision of the bill designed greatly to strengthen it after our entry into the war, the Senate Committee substituted the present language for the phrase "upon a proper showing."

Under the Federal Trade Commission Act, which provides that the Commission "shall" issue a cease-and-desist order wherever it finds that a person has been using an unfair method of competition, the order will issue on such a finding, and if the finding is supported by evidence the courts will enforce the order. *Educators Ass'n* v. *Federal Trade Commission,* 108 F. (2d) 470 (C. C. A. 2); *Perma-Maid Co.* v. *Federal Trade Commission,* 121 F. (2d) 282 (C. C. A. 6). Good faith is not a defense, for reasons expressed by the court in *Gimbel Bros.* v. *Federal Trade Commission,* 116 F. (2d) 578 (C. C. A. 2), where an order was enforced against a company which had innocently misdescribed certain merchandise in an advertisement published on two days. The court observed that the purpose of the Act was the protection of the public and not the punishment of a wrongdoer; and the deception of purchasers is the same whether the misrepresentation was inadvertent or deliberate. A minatory order is well calculated to induce a higher degree of care against future lapses.[11] Nor is it material under

[11] Compare Holmes, J., concurring in *Arizona Employers' Liability Cases,* 250 U. S. 400, 431, 432–433:

"There is no more certain way of securing attention to the

the statute that violations have ceased. *Federal Trade Commission* v. *Goodyear Tire Co.*, 304 U. S. 257.[12]

Similarly, under Section 10 (c) of the National Labor Relations Act, while so-called "affirmative" orders rest in the discretion of the Board to effectuate the purposes of the Act, cease-and-desist orders are to be issued upon proof that unfair labor practices have been committed. Cf. *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 265. The petitioner's faint suggestion of a constitutional doubt under Article III if

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safety of the men, an unquestionably constitutional object of legislation, than by holding the employer liable for accidents. Like the crimes to which I have referred they probably will happen a good deal less often when the employer knows that he must answer for them if they do."

[12] See also *Buntè Bros.* v. *Federal Trade Commission*, 104 F. (2d) 996 (C. C. A. 7); *Educators Ass'n* v. *Federal Trade Commission*, 108 F. (2d) 470 (C. C. A. 2); *Perma-Maid Co.* v. *Federal Trade Commission*, 121 F. (2d) 282, 284 (C. C. A. 6); *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. (2d) 673, 686 (C. C. A. 8); *Fairyfoot Products Co.* v. *Federal Trade Commission*, 80 F. (2d) 684, 686 (C. C. A. 7); *Federal Trade Commission* v. *A. McLean & Son*, 84 F. (2d) 910, 912 (C. C. A. 7); *Federal Trade Commission* v. *Wallace*, 75 F. (2d) 733, 738 (C. C. A. 8); *Federal Trade Commission* v. *Good-Grape Co.*, 45 F. (2d) 70 (C. C. A. 6); *Guarantee Veterinary Co.* v. *Federal Trade Commission*, 285 Fed. 853, 859–60 (C. C. A. 2, 1922); *Arkansas Wholesale Grocers Ass'n* v. *Federal Trade Commission*, 18 F. (2d) 866, 871 (C. C. A. 8); *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, 310 (C. C. A. 7).

The case of *Federal Trade Comm'n* v. *Civil Service T. Bureau*, 79 F. (2d) 113 (C. C. A. 6), cited by petitioner (Pet. 22), was decided by the court whose later similar decision in the *Goodyear* case was reversed, 304 U. S. 257.

courts are not left with discretion to apply the usual canons of equity in statutory injunction cases (Pet. 23) is shortly disposed of by the accepted practice under these statutes, a practice which even more greatly narrows the judicial function in imposing the injunctive sanction, since there the facts are found by another tribunal.

As the separate opinion of the majority below aptly stresses (R. 611), any punitive remedy will not be applied until the injunctive order is violated, and if that occasion arises, the court will doubtless take into consideration the question whether the violations of the order have been trivial and whether they have been due to human frailty. If violations occur of a nature that the court regards as justifying a penalty for contempt, the result of the decision below is that the sanction is applied after two sets of violations, of investigations and of judicial proceedings rather than after three. Surely it is not extraordinary that Congress should have so provided in a statute the enactment of which was characterized by the Senate Committee as "imperative to the safety of our country" (R. 610), violations of which have an irreparable effect, and the enforcement of which is, by any standards, an immense task.

CONCLUSION

The decision below is correct and there is no conflict with decisions of other appellate courts.

The question presented is important, and for that reason we do not feel justified in opposing the petition.

Respectfully submitted.

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